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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

SHENZHEN SMOORE  
TECHNOLOGY CO. LTD.,

*Plaintiff,*

v.

NEXT LEVEL VENTURES, LLC and  
ADVANCED VAPOR DEVICES  
LLC,

*Defendants.*

NEXT LEVEL VENTURES, LLC,

*Counterclaim-Plaintiff,*

v.

SHENZHEN SMOORE  
TECHNOLOGY CO. LTD.,

*Counterclaim-Defendant.*

Case No. 2:22-cv-07646-AB-AGR

**COUNTERCLAIM-PLAINTIFF  
NEXT LEVEL VENTURES, LLC'S  
OPPOSITION TO  
COUNTERCLAIM-DEFENDANT  
SHENZHEN SMOORE  
TECHNOLOGY CO. LTD.'S  
MOTION TO BIFURCATE AND  
STAY ANTITRUST  
COUNTERCLAIMS OR, IN THE  
ALTERNATIVE, TO DISMISS  
COUNTERCLAIM-PLAINTIFF'S  
AMENDED COUNTERCLAIMS  
AND STRIKE AFFIRMATIVE  
DEFENSES; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Date: December 6, 2024  
Time: 10 a.m.  
Courtroom 7B

Judge: Hon. André Birotte Jr.

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1           **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2           Neither bifurcation nor dismissal of NLV’s antitrust counterclaims (“NLV’s  
3 claims”) is warranted. Bifurcating NLV’s claims would require this Court to oversee  
4 two trials involving overlapping facts and duplicative evidence. Staying NLV’s  
5 claims would double the length of this overall litigation and embroil this Court in  
6 predictable disputes over the relevance of particular discovery to each claim. And  
7 dismissal is inappropriate because NLV amply alleges that Smoore unreasonably  
8 restrained trade and that the *Noerr-Pennington* doctrine does not apply.

9           Smoore concedes that the authority in favor of bifurcation arose in situations  
10 where “if the plaintiff wins the patent infringement suit, then the antitrust  
11 counterclaim may ordinarily be disposed of expeditiously on motion, instead of by a  
12 time consuming and expensive trial.” *See* ECF No. 80, Smoore’s Mot. (“Mot.”) at 6  
13 (citation omitted). That is not the circumstance here.

14           Smoore alleges that NLV has infringed two patents and three design patents.  
15 NLV alleges that Smoore unlawfully restrained trade by, *inter alia*: submitting a  
16 fraudulent patent application; pursuing baseless litigation for competitive advantage;  
17 and imposing unreasonably exclusionary agreements on its distributors for Closed  
18 Cannabis Oil Vaporizer Systems and Components that excluded NLV and others  
19 from most of relevant market. *See* ECF No. 64, NLV’s Am. Answer & Countercl.  
20 (“AA&C”). Although the parties’ claims involve common evidence, Smoore’s  
21 infringement action would not, even if successful, dispose of or even substantially  
22 narrow NLV’s claims.

23           Were the claims bifurcated, key witnesses on both sides would be required to  
24 testify at two separate trials. Certain Smoore employees would testify about both the  
25 substantive aspects of Smoore’s patent claims and Smoore’s business strategy as it  
26 relates to NLV’s counterclaims in both trials. Similarly, NLV’s principal and other  
27 senior employees would be called twice to testify regarding NLV’s product  
28 development and sales strategy and the real-world market foreclosure Smoore’s



1 conduct inflicted. At least one third party distributor, and likely others, would also be  
2 required to testify twice, as would experts from both sides.

3 Staying NLV's claims would only worsen the inefficiency. Two separate juries  
4 would need to be impaneled, which would both waste judicial resources and create  
5 the risk of conflicting findings of fact. Trial of NLV's claims would necessarily take  
6 place well after the trial of Smoore's infringement action to permit time for antitrust  
7 discovery. NLV's case would suffer the prejudice common to protracted litigation:  
8 fading memories, fewer available witnesses, lost evidence, and the significant  
9 additional litigation expense associated with two separate discovery periods. From  
10 Smoore's perspective, that is a feature of bifurcation, not a bug. But there is no reason  
11 this Court should indulge Smoore's request.

12 Smoore's arguments in favor of dismissal are no more persuasive. Smoore first  
13 asserts that NLV's proposed market definition is too broad because NLV should not  
14 have included the words "and its components." The argument both misconceives the  
15 interchangeability requirement and raises a factual dispute about the nature of the  
16 market that this Court would be unwise to resolve without the benefit of discovery.

17 Smoore next argues that the *Noerr-Pennington* doctrine insulates Smoore's  
18 patent enforcement efforts from antitrust liability. This argument: (1) ignores the  
19 *Walker Process* exception to *Noerr-Pennington*; (2) misstates the legal requirements  
20 of the sham litigation exception; and (3) mischaracterizes the ITC Administrative  
21 Law Judge's ("ITC ALJ's") rulings against Smoore.

22 The ITC ALJ concluded that Smoore's patent prosecutor "Mr. Cheng  
23 **knowingly submitted a false declaration** about the reason the '553 application  
24 [leading to the '623 patent] was abandoned" and "that the declaration submitted by  
25 Mr. Cheng was material to the subsequent issuance of patents maturing from the '553  
26 application, which includes the '623 patent asserted in this investigation." AA&C,  
27 Ex. 2 at 93 (emphasis added). NLV amply pleaded a *Walker Process* claim by  
28 alleging that Smoore maintained its monopoly, in part, by seeking to enforce the '623

1 patent before the ITC. *See Hydranautics v. FilmTec Corp.*, 70 F.3d. 533, 538-9 (9th  
2 Cir. 1995).

3 NLV has also pleaded a “sham litigation” claim. Smoore asserts—without  
4 citation—that the sham litigation exception only applies where “the **current lawsuit**  
5 is objectively meritless, as required.” Mot. at 18 (emphasis in original). Smoore is  
6 wrong: the Ninth Circuit specifically held that a plaintiff may rely on the sham  
7 litigation exception to bring an antitrust claim arising from the defendant’s prior  
8 prosecution of a fraudulently obtained patent. *See Hydranautics*, 70 F.3d at 534-539.  
9 It is difficult to explain why Smoore quoted *Hydranautics* on page 6 of its Motion  
10 but later failed to acknowledge that the case forecloses Smoore’s sham litigation  
11 argument. *See* Mot. at 18.

12 Smoore’s remaining arguments are a scattershot effort to suggest that NLV’s  
13 claims must be dismissed unless every act Smoore undertook in furtherance of its  
14 anticompetitive scheme would, considered in isolation, state an antitrust claim. That  
15 is not how antitrust cases are analyzed. Rather, the Court must consider whether  
16 NLV’s allegations, taken as a whole, adequately pleaded a Sherman Act case.

17 For example, Smoore argues that NLV’s Section I & II claims arising from  
18 Smoore’s distribution agreements fail because NLV has not alleged substantial  
19 market foreclosure. *See* Mot. at 12-15. That is incorrect: NLV’s allegation that  
20 Smoore’s conduct foreclosed approximately 80% of the market is more than  
21 sufficient at this stage to state a claim. And in any event the question is not whether  
22 Smoore’s exclusive dealing agreements would be unlawful standing alone. The issue  
23 is whether those agreements—in concert with Smoore’s abusive patent enforcement  
24 efforts, horizontal restraints on competition, vertical restraints on pricing, and other  
25 anticompetitive activity—unreasonably restrained trade. NLV has more than  
26 adequately alleged that they did.

## II. THE PRODUCT AND MARKETS AT ISSUE

Cannabis can be smoked, ingested in various edible forms, or inhaled using “closed” or “open” vaporizers.<sup>1</sup> AA&C ¶¶ 90-91. Just as there are separate markets for wine, beer and spirits, there are separate markets for different cannabis consumption mechanisms based on the different characteristics of the products. This case involves Closed Cannabis Oil Vaporizer Systems and Components (“closed systems”), which are cannabis delivery products usually consisting of a mouthpiece, reservoir, and atomizer assembly. *See id.* ¶ 98; *see* ECF No. 1 (“Compl.”) ¶ 20 (describing and diagramming closed systems). Closed systems rely on an atomizer to vaporize cannabis oil contained in the reservoir. AA&C ¶¶ 98-100. Closed systems are generally sold empty to cannabis oil producers, who then add cannabis oil to the cannabis reservoir and sell the systems to consumers through various retail channels. *Id.* ¶ 97. Closed systems come in many forms, including cartridges, pods, and “all-in-one” systems. *Id.* ¶ 96. Although Smoore quibbles with the words “and components” in the proposed market, Smoore does not dispute any other aspect of NLV’s market allegations, set forth in detail in the AA&C. *See Id.* ¶¶ 88-105.

## III. BRIEF SUMMARY OF NLV’S ALLEGATIONS

In 2018, Smoore, one of the world’s largest manufacturers of nicotine vaporizers, controlled 80% of the closed systems market. AA&C ¶¶ 25-31. However, as customers began to demand higher-quality closed systems tailored specifically for cannabis oils, Smoore began losing market share to new competitors who offered products made for use with cannabis, including NLV. *Id.* ¶¶ 32-34.

Faced with this decline, Smoore undertook a plan to suppress and eliminate competition through two complementary courses of conduct: (1) abusing the legal systems of both China and the United States to impose significant costs on smaller

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<sup>1</sup> Closed systems vaporize cannabis oil contained in a pre-filled cartridge; open cannabis vaporizer systems vaporize separately purchased dried cannabis plant material or solid cannabis concentrates. AA&C ¶¶ 94-96. Smoore does not challenge NLV’s allegation that the markets for closed and open systems are distinct.

1 competitors and drive them from the market; and (2) using Smoore’s early market  
2 power to exclude smaller competitors by enforcing abusive and exclusionary  
3 distribution agreements. *Id.* ¶¶ 36-37. Smoore’s anticompetitive distribution  
4 agreements successfully foreclosed NLV from approximately 80% of the relevant  
5 market for several years. *Id.* ¶ 78. Smoore’s abusive patent litigation drove several  
6 nascent competitors from the market and hobbled other competitors, like NLV, with  
7 litigation expenses and market uncertainty that significantly retarded their ability to  
8 grow and compete. *Id.* ¶¶ 35, 51. Although Smoore lost market share between 2019  
9 and 2023, Smoore’s tactics permitted it to slow the pace of market share loss and  
10 retain a dominant market share of 50-60% as late as 2023. *Id.* ¶¶ 35, 78.

11 As an aspect of this scheme, Smoore filed a Complaint for patent infringement  
12 with the ITC alleging that NLV had infringed three patents. *Id.* ¶ 18. One was the  
13 ’623 patent, which purportedly encompassed all accused NLV vaporizer products.  
14 *Id.* ¶ 20. During the course of the ITC investigation, NLV learned that the ’623 patent  
15 was obtained through fraud on the United States Patent & Trademark Office  
16 (“USPTO”) and thus was unenforceable. *Id.* ¶ 21.

17 As the ITC ALJ found, “in late 2014 and early 2015, Smoore, through an  
18 employee of its intellectual property department named Wenjian Qi, learned of an  
19 abandoned patent application submitted by inventor Xiaolin Fang. Qi and Fang  
20 reached an agreement whereby a company headed by Mr. Qi’s wife would purchase  
21 the abandoned application. Qi then worked with a patent prosecutor to revive the  
22 patent application by fraudulently asserting that the delay in filing the [required] reply  
23 to the notice of abandonment was unintentional. After the patent (’623) was issued  
24 from continuations of this application, Smoore purchased the patent from the  
25 company headed by Mr. Qi’s wife.” *Id.* ¶ 44 (citing AA&C, Ex. 2 at 91-92). The  
26 ALJ’s conclusion was crystal clear:

27 There is only one conclusion that a reasonable factfinder can draw from  
28 this record evidence: [patent prosecutor] Mr. Cheng knowingly

1 submitted a false declaration about the reason the '553 application  
2 [leading to the '623 patent] was abandoned. I so find.

3 AA&C ¶ 48 (quoting AA&C, Ex. 2 at 93). The ITC ALJ also found:

4 ... the declaration submitted by Mr. Cheng was material to the  
5 subsequent issuance of patents maturing from the '553 application,  
6 which includes the '623 patent asserted in this investigation, because the  
7 Patent Office would never have revived the '553 application had Mr.  
8 Cheng not submitted the declaration.

9 AA&C, Ex. 2 at 93. The ITC ALJ therefore found that the '623 patent was  
10 unenforceable due to inequitable conduct. AA&C, Ex. 2 at 94. The ITC ALJ also  
11 dismissed Smoore's claims arising from the two patents at issue in this case.  
12 AA&C ¶ 22. Smoore's prior U.S. counsel learned during discovery in the ITC action  
13 (at the latest) that the '623 patent was obtained by a materially false declaration and  
14 yet continued to press Smoore's claim to the ITC. AA&C ¶ 21.

#### 14 **IV. NLV'S ANTITRUST COUNTERCLAIMS SHOULD NOT BE** 15 **STAYED OR BIFURCATED.**

##### 16 **A. Bifurcation is Unwarranted and Premature.**

##### 17 **1. Bifurcation Would Require Two Trials and** 18 **Would Thereby Waste Judicial Resources.**

19 Rule 42(b) affords courts discretion to bifurcate claims in order to preserve  
20 judicial resources and avoid jury confusion or prejudice. *See* Fed. R. Civ. P. 42(b).  
21 "The party requesting bifurcation has the burden of proving that bifurcation is  
22 justified given the particular circumstances." *Michael Kors, L.L.C. v. Chunma U.S.A.,*  
23 *Inc., et al.*, 2017 WL 5665003, at \*1 (C.D. Cal. Aug 30, 2017) (Birotte, J.). The  
24 advisability of bifurcation is best determined after fact discovery and motion practice  
25 have clarified whether "handling the trial by chapters" is appropriate. *Netflix, Inc. v.*  
26 *Blockbuster, Inc.*, 2006 WL 2458717, at \*10 (N.D. Cal Aug 22, 2006). Thus, in  
27 *Michael Kors*, this Court bifurcated the liability and damages trials of a trademark  
28 action after two years of litigation had made clear that the liability phase could be

1 dispositive of the damages issue and that bifurcation would not require impaneling  
2 separate juries for each action. *See Michael Kors*, 2017 WL 5665003, at \*2.

3 Bifurcation may double the amount of time required to complete related  
4 actions. *See Zenith Elecs., LLC, et al. v. Sceptre, Inc.*, 2015 WL 12830689, at \*2-3  
5 (C.D. Cal. Feb. 5, 2015). Bifurcation thus is inappropriate where, as here, patent and  
6 antitrust cases involve intertwined facts but resolution of the patent case does not  
7 potentially dispose of the antitrust action. *Id.*; *see also Dentsply Int'l, Inc. v. New*  
8 *Tech. Co.*, 1996 WL 756766 (D. Del. Dec 19, 1996). Bifurcation of such actions  
9 slows resolution of the overall case and is likely to “devolve into a series of time-  
10 consuming and expensive discovery disputes as to whether particular discovery is  
11 directed at the patent or antitrust claims.” *Id.* at \*6.

12 “A decision ordering bifurcation is dependent on the facts and circumstances  
13 of each case.” *Aurora World, Inc. v. Ty, Inc.*, 2011 WL 13185687, at \*2 (C.D. Cal.  
14 Mar. 14, 2011) (additional citation omitted). Courts often bifurcate patent and  
15 antitrust claims where an antitrust counterclaim “attacks the patent infringement  
16 lawsuit itself as the wrong which furnishes the basis for antitrust damages.”  
17 *Hydranautics*, 70 F.3d at 536-537. In such cases, “there is often “not much point in  
18 litigating [the] antitrust claims until [the] infringement case [i]s resolved.” *Id.* Smoore  
19 therefore grounds its request for bifurcation on cases like *Fitbit, Inc. v. Aliphcom*,  
20 2016 WL 7888033 (N.D. Cal. May 27, 2016), where it was “highly likely that the  
21 antitrust issues will be resolved or rendered moot upon resolution of patent  
22 infringement and validity issues.” *Id.* at \*2; Mot. at 7.

23 That is not, however, the situation presented here. While NLV’s claims arise  
24 from facts intertwined with Smoore’s claims, resolution of Smoore’s case will not  
25 dispose of or even markedly simplify NLV’s claims. Smoore’s win would establish  
26 (at most) that NLV violated the ’762 and ’763 patents and three design patents. It  
27 would not inform whether Smoore’s attempt to enforce the ’623 patent violated the  
28 antitrust laws or whether Smoore’s unreasonably restrictive distribution agreements



1 worked in concert with Smoore’s baseless litigation to unreasonably restrain trade or  
2 unlawfully monopolize the relevant market.

3 Smoore argues that “if the jury finds that Smoore’s patents are valid” it would  
4 “likely lead to the dismissal of NLV’s ‘sham’ counterclaims.” Mot. at 5-6. But why?  
5 Smoore does not offer any reason that its victory would dispose of NLV’s claims,  
6 and there is none. Indeed, Smoore concedes that the sham litigation aspect of NLV’s  
7 claims focuses on the “’623 patent,” which “is **not** part of Smoore’s claims in the  
8 instant lawsuit – and NLV admits as much.” *Id.* at 18 (emphasis in original). This  
9 case is thus different from *Edwards Vacuum, LLC v. Hoffman Instrumentation Supply*  
10 *Inc.*, 556 F. Supp. 3d 1156, 1180 (D. Or. 2021), on which Smoore relies, in which the  
11 defendant’s counterclaim rose or fell depending on the reasonableness of the  
12 plaintiff’s enforcement efforts. *See* Mot. at 4-6.

13 On the contrary, bifurcation here would simply mandate two trials. That  
14 approach would be spectacularly inefficient because many of the same facts and  
15 witnesses would have to be presented in each trial. For example, third party and  
16 Smoore distributor Jupiter Research, LLC has knowledge related to: (1) the validity  
17 of two of the patents involved in Smoore’s case; (2) the effects of Smoore’s effort to  
18 litigate the ’623 patent; and (3) Smoore’s other anticompetitive practices, including  
19 its distribution agreements and restrictions on distributors. Jupiter’s representatives  
20 would therefore have to be called for both trials. Other third parties are likely  
21 similarly situated.

22 Both the Chairman of Smoore and NLV’s principal would also have to be  
23 called twice to testify about the prosecution, conception, reduction to practice, claim  
24 construction, and prior art of all three patents, as well as various business practices  
25 relevant to the antitrust claims. Other senior-level personnel would be in a similar  
26 position. And experts for both sides would need to be called (and paid) to testify in  
27 each trial regarding NLV’s and Smoore’s sales data and the nature of the market.  
28 This list is exemplary, not exhaustive.



1 Such duplication carries real-world consequences beyond wasting the Court's  
2 time and the litigants' money. Sequential trials would likely mean separate juries  
3 evaluating the credibility of the same witnesses on overlapping topics. Trial  
4 objections challenging the relevance, permissibility or necessity of certain evidence  
5 in light of the outcome of the other trial are virtually certain. Bifurcation also would  
6 require both juries to make credibility assessments without live testimony from key  
7 witnesses regarding all issues pertinent to both cases and would create the possibility  
8 of inconsistent results and collateral challenges to both verdicts.<sup>2</sup>

9 **B. NLV's Amended Complaint and Discovery Requests Do Not**  
10 **Justify Bifurcation.**

11 Smoore's original motion to bifurcate and stay was a two-page afterthought; it  
12 is now the centerpiece of Smoore's Motion. Smoore justifies its new approach by  
13 focusing on this Court's Order appointing Special Master Olson and the Court's  
14 comments at the scheduling conference to the effect that this case is complicated. *See*  
15 *Mot. at 3* (citing ECF No. 79) (Order Appointing Special Master). But the Court  
16 largely addressed the complexity issue by appointing Special Master Olson, who is  
17 well-positioned to address the various overlapping issues in the case in a timely  
18 manner and to minimize expenditure of judicial resources.

19 More to the point, bifurcation would drag out rather than reduce the complexity  
20 of this action. Putting off the difficult part of a job does not make it any easier in the  
21 long run. Experience dictates that the years-long piecemeal litigation of overlapping  
22 issues virtually guarantees a protracted litigation schedule, duplicative work, and  
23 needless resource expenditure.<sup>3</sup>

24 <sup>2</sup> There are potentially other difficult to predict problems as well. Smoore is based in  
25 China, meaning certain witnesses could appear for Smoore's case and then find  
26 themselves unavailable for NLV's case. This would be especially problematic if  
27 documents impeaching the witnesses' credibility were produced after the Smoore  
28 trial but before NLV's trial. Other similar complications are predictable.

<sup>3</sup> Smoore also cites the parties' Joint Rule 26(f) Report to argue that bifurcation will  
result in: "(1) an earlier trial date, and (2) roughly half the trial days needed."

1 Bifurcation would also run contrary to L.R. 16-15 (encouraging disposition of  
2 civil litigation by settlement). It will be challenging for Smoore and NLV to discuss  
3 resolution until after discovery has clarified the strength and weakness of the various  
4 claims, particularly NLV's claims, which were not presented to the ITC ALJ. Staying  
5 the antitrust case is therefore likely to delay settlement discussions (if any) until well  
6 after the first trial of Smoore's claims. At minimum, bifurcation would severely  
7 prejudice NLV's ability to negotiate before the antitrust case is well-advanced. *See*  
8 *Procter & Gamble Co. v. CAO Group, Inc.*, 2013 WL 6061103, at \*3 (N.D. Ohio.  
9 Nov. 18, 2013) (bifurcation denied in part because of prejudice to defendant's  
10 settlement position).

11 **C. The Prejudice Analysis Favors NLV and Smoore's Jury**  
12 **Confusion Arguments Are Premature.**

13 Smoore also argues bifurcation is appropriate because the jury might be  
14 confused or Smoore prejudiced by the simultaneous presentation of Smoore's and  
15 NLV's claims. Mot. at 6-7. Any theoretical prejudice to Smoore, however, must be  
16 weighed against the certain prejudice to NLV of delaying resolution of its claims for  
17 what would likely be years. That risk weighs against bifurcation. *See Procter*, 2013  
18 WL 6061103, at \*3 (bifurcation denied in part because of the risk "witnesses may  
19 become unavailable or have their memories fade while the patent issues are  
20 litigated.").

21 Smoore's arguments regarding juror confusion and prejudice are premature  
22 given that neither the Court nor the parties yet know what evidence will be presented  
23 to the jury and in what format. Nor has there been an opportunity to evaluate less  
24 draconian approaches to addressing prejudice or confusion through jury instructions  
25 or targeted evidentiary limitations. *See Netflix*, 2006 WL 2458717, at \*10 (denying

26  
27 Mot. at 4. This argument is obviously misleading. Smoore's proposal contemplates  
28 two separate trials that would collectively require more days than a single trial of all  
claims. The second trial would necessarily take place well after a first trial given the  
need to undertake antitrust-related discovery.

1 bifurcation at the outset of discovery without prejudice to either side to seek  
2 bifurcation at the pretrial conference). The Court should not bifurcate this case  
3 without a complete understanding of the evidence to be presented and the availability  
4 and effectiveness of trial options that would address Smoore's purported concerns.

5 **D. Staying NLV's Antitrust Claims Would Not Promote Judicial**  
6 **Economy.**

7 Staying NLV's claims is a bad idea for the same reasons bifurcation is a bad  
8 idea. Smoore's primary argument in favor of a stay is that antitrust litigation is  
9 expensive. *See* Mot. at 8. Which it is, for both sides. Smoore at least could have  
10 avoided its share of the expense by policing its conduct from the outset; NLV did not  
11 have that option. *Cf. Dentsply*, 1996 WL 756766, at \*6 (Court was "skeptical" about  
12 plaintiffs' concern for expense because "they should have expected an antitrust  
13 counterclaim, now commonplace in patent litigation.").

14 In any event, the relevant question is whether delaying NLV's case will reduce  
15 the expense of litigating this case. The answer is no, because resolution of Smoore's  
16 patent case will not resolve or even significantly narrow NLV's antitrust claims.  
17 Indeed, some costs would likely increase because witnesses would need to be  
18 deposed twice, documents would need to be reviewed and categorized by relevance  
19 to each claim, and the parties would litigate over what discovery belongs in which  
20 phase. *See id.* Smoore's proposal would merely delay certain costs until the passage  
21 of time has significantly prejudiced NLV's case. Smoore's request for delay is  
22 understandable given Smoore's historic practice of using litigation to force less well-  
23 resourced competitors like NLV out of the market. But this Court should not indulge  
24 Smoore's interest.

25 **V. SMOORE'S MOTION TO DISMISS NLV'S COUNTERCLAIMS**  
26 **SHOULD BE DENIED**

27 **A. Applicable Legal Standards.**

28 Courts evaluating a Rule 12(b)(6) motion must accept as true all allegations of

1 material fact and construe all inferences in the light most favorable to the non-moving  
2 party. *See Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). A complaint should  
3 not be dismissed where a plaintiff has alleged “enough facts to state a claim to relief  
4 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

5 Just as a conspiracy is “not to be judged by dismembering it and viewing its  
6 separate parts,” (*Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S.  
7 690, 699 (1962)), exclusionary schemes should be considered in their totality. *United*  
8 *States v. Grinnell Corp.*, 384 U.S. 563, 576 (1966). “[W]hen a plaintiff alleges that a  
9 scheme or course of conduct was anticompetitive, the scheme or conduct must be  
10 considered as alleged, not in manufactured subcategories.” *Duke Energy Carolinas,*  
11 *LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 355 (4th Cir. 2024) (reversing district  
12 court that “erroneously ‘compartmentalized’ the various aspects of Duke’s  
13 anticompetitive conduct and asked whether each one, *independently*, was unlawful”  
14 in monopolization case) (emphasis in original).

15 **B. The Noerr-Pennington Doctrine Does Not Insulate Smoore from**  
16 **Liability.**

17 Smoore is not entitled to *Noerr-Pennington* immunity because Smoore  
18 knowingly relied on a fraudulent declaration to the USPTO to obtain the ’623 patent  
19 and then tried to enforce that patent before the ITC.

20 “In *Noerr*, the Supreme Court held that no violation of the Sherman Act may  
21 be predicated upon the defendant’s attempts to influence the passage or enforcement  
22 of laws.” *Hydranautics*, 70 F.3d at 537 (citing *Eastern R. R. Presidents Conf. v. Noerr*  
23 *Motor Freight, Inc.*, 365 U.S. 127, 135 (1961)). There are two recognized exceptions.  
24 The “sham litigation” exception applies where a litigant either: (1) engages in  
25 objectively baseless litigation intended only to “interfere directly with the business  
26 relationships of a competitor,” *Noerr*, 365 U.S. at 144; or (2) seeks to enforce a patent  
27 obtained through intentional fraud. *Hydranautics*, 70 F.3d at 537-8. The “*Walker*  
28 *Process*” exception applies where a defendant obtains or maintains a monopoly by

1 virtue of knowing and willful fraud on the USPTO. *Walker Process Equip., Inc. v.*  
2 *Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (Harlan, J., concurring)). The  
3 “sham litigation” exception and the *Walker Process* exception both “provide  
4 alternative legal grounds on which a patentee may be stripped of its immunity from  
5 the antitrust laws” and “both legal theories may be applied to the same conduct.”  
6 *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir. 1998).  
7 “[C]ourts rarely award *Noerr-Pennington* immunity at the motion to dismiss  
8 stage, where the Court must accept as true the non-moving party’s well-pleaded  
9 allegations with respect to sham litigation.” *See Relevant Grp. LLC v. Nourmand*,  
10 2022 WL 2189535, at \*3 (C.D. Cal. Mar. 4, 2022) (additional citation omitted).  
11 NLV’s fraud allegations here are drawn directly from the ITC ALJ’s conclusions.

12 **1. NLV Has Sufficiently Pleaded a *Walker Process* Claim.**

13 Although Smoore ignores the *Walker Process* exception, NLV’s allegation  
14 that Smoore maintained its monopoly in part by submitting a materially false  
15 declaration to the USPTO to obtain the ’623 patent states a *Walker Process* claim.

16 A *Walker Process* claim requires that: (1) the relevant patent was “procured  
17 by knowing and willful fraud practiced by the defendant on the Patent Office ...”;  
18 and (2) the other elements of a [Section] 2 monopolization charge are proven. *Walker*  
19 *Process*, 382 U.S. at 179 (Harlan, J., concurring). Only the fraud element must be  
20 pleaded with specificity. *Bal Seal Eng’g, Inc. v. Nelson Prod., Inc.*, 2016 WL  
21 11495986, at \*6 (C.D. Cal. Dec. 7, 2016).<sup>4</sup>

22 NLV alleges that Smoore obtained the ’623 patent by submitting a false  
23 declaration to the USPTO that was material to the issuance of the ’623 patent. AA&C  
24 ¶¶ 21-22, 44, 47-48. Although Smoore spends several pages trying to minimize its

25 <sup>4</sup> Smoore’s citation to *Kottle v. Nw. Kidney Centers*, 146 F.3d 1056, 1063 (9<sup>th</sup> Cir.  
26 1998), Mot. at 22, confuses the pleading standard. *Kottle* involved the narrower  
27 exception to *Noerr-Pennington* applicable to administrative rather than judicial  
28 proceedings. *See id.*; Mot. at 16. In the litigation context, only allegations of fraud  
are subject to a heightened pleading standard. *Empress LLC v. City & Cnty. of San Francisco*, 419 F.3d 1052, 1056 (9<sup>th</sup> Cir. 2005).



1 conduct (Mot. at 17-18, 20-21), the ITC ALJ's findings amply demonstrate  
2 intentional fraud. *See* Section III., *supra* (reciting ITC ALJ's findings). NLV's claims  
3 are thus sufficient to satisfy the fraud element of the *Walker Process* exception.  
4 *Walker Process*, 382 U.S. at 179. Smoore does not challenge the other elements of  
5 NLV's monopolization claims aside from market definition, which is addressed in  
6 Section V.C., *infra*.<sup>5</sup>

## 7                   2.     NLV's Claims Satisfy the Sham Litigation Exception.

8           NLV's claims also fall within the "sham litigation" exception. The sham  
9 litigation exception applies where a defendant causes antitrust injury<sup>6</sup> by pursuing  
10 patent litigation that is objectively baseless and "motivated by a desire to interfere  
11 *directly* with the business relationships of a competitor." *Bal Seal*, 2016 WL  
12 11495986, at \*5 (emphasis in original) (cleaned up). The sham litigation exception  
13 is also satisfied where a litigant causes antitrust injury by attempting to enforce a  
14 patent obtained by fraud. *Hydranautics*, 70 F.3d at 537-38. Smoore's attempted  
15 enforcement of the '623 patent satisfies the sham litigation exception. *See*  
16 *Hydranautics*, 70 F.3d at 537-38; *Consumerinfo.com, Inc. v. Chang*, 2009 WL  
17 10673208, at \*4 (C.D. Cal. Nov. 12, 2009).

## 18                   3.     There Is No Requirement that a Sham Litigation Claim Arise 19                   from Pending Litigation.

20           Smoore argues that NLV cannot satisfy the sham litigation exception because  
21 "NLV has [] pled nothing that could plausibly support a finding that the **current**  
22 **lawsuit** is objectively meritless, as required." *See* Mot. at 18 (emphasis in original).

23           <sup>5</sup> Smoore cites to *Nobelpharma*, 141 F.3d 1059 (Mot. at 16-17 n.5), but the substance  
24 of the case forecloses Smoore's *Noerr-Pennington* immunity argument. *See*  
25 *Nobelpharma*, 141 F.3d at 1073 (finding of *Walker Process* fraud where a book  
material to the patent was fraudulently kept from the USPTO).

26           <sup>6</sup> Smoore does not dispute that its conduct caused NLV antitrust injury. NLV alleges  
27 that Smoore's efforts to enforce the fraudulently obtained '623 patent cost NLV at  
28 least \$3 million of damages and the loss of significant business to Smoore. *See*  
AA&C ¶¶ 57-58; *Cf. Bal Seal*, 2016 WL 11495986, at \*7 (counterclaim plaintiff  
pleaded antitrust injury where fraud committed on the USPTO cost the plaintiff the  
time and money spent defending the case, lost business, and increased costs).

1 Smoore cites no authority for this proposition, and there is none. The Ninth Circuit  
2 in *Hydranautics* (which Smoore cites elsewhere) specifically considered whether the  
3 *Noerr-Pennington* doctrine insulated a prior patent enforcement action seeking to  
4 enforce a patent allegedly obtained by fraud. *See Hydranautics*, 70 F.3d at 538-39.  
5 The court concluded that such claims could not be dismissed “short of summary  
6 judgment or trial.” *Id.* at 539.

7 Smoore’s protest that the ITC decision was not influenced by Smoore’s  
8 misrepresentation to the USPTO is irrelevant. *See Mot.* at 20. Smoore’s false  
9 declaration to the USPTO triggered the *Walker Process* exception regardless of its  
10 effect on the ITC proceedings. *See Hydranautics*, 70 F.3d at 537-8; *Bal Seal*, 2016  
11 WL 11495986, at \*7. Moreover, Smoore’s former counsel continued to press  
12 Smoore’s infringement claim after counsel knew of their client’s earlier fraud. *See*  
13 Section III., *supra*. Pursuing a claim known to be baseless is the definition of sham  
14 litigation.

15 **4. Smoore’s Effort to Enforce a Fraudulently Obtained Patent**  
16 **is Part of a Larger Scheme that is not Insulated by *Noerr-Pennington*.**

17 Even were the Court to find that no sham litigation or *Walker Process*  
18 exception applies—which would be error—Smoore’s false statements to the USPTO  
19 could still be considered as part of Smoore’s broader anticompetitive scheme, which  
20 of course is not protected by *Noerr-Pennington*. *See In re Pandora Media, LLC*, 2022  
21 WL 19299126, at \*8 (C.D. Cal. Oct. 26, 2022) (“[E]ven when litigation itself is  
22 immunized, a litigant cannot avail itself of *Noerr-Pennington* immunity when the  
23 litigation is used to enforce an unlawful scheme.”).

24 Here, NLV alleges that Smoore’s patent enforcement action enabled Smoore  
25 to undertake further action to exclude competitors from the closed systems market,  
26 including: (1) using uncertainty created by the patent litigation to poach NLV’s  
27 customers; (2) harming NLV’s business and reputation by falsely claiming NLV  
28 would be liable for patent infringement; and (3) entering into exclusionary settlement



1 agreements to force competitors out of the market.<sup>7</sup> AA&C ¶¶ 56-58. Smoore also  
2 entered into collusive and coercive distribution agreements that foreclosed most  
3 distribution channels and forced NLV and other nascent competitors to maintain  
4 additional costly sales and distribution infrastructure. *Id.* ¶¶ 79-82. This entire  
5 scheme constitutes actionable conduct that is not protected by *Noerr-Pennington*.<sup>8</sup>

### 6 C. NLV Alleges a Viable Market.

7 “In the Ninth Circuit, one seeking to bring a claim under Section 2 must plead:  
8 (1) that the party against whom the claim is brought ‘possesses monopoly power in  
9 the relevant market’; (2) that party has ‘willfully acquired or maintained that power’;  
10 and (3) that party’s conduct has ‘caused antitrust injury.’” *Bal Seal*, 2016 WL  
11 11495986, at \*6. The only element Smoore challenges is NLV’s definition of the  
12 relevant market.

13 The boundaries of an antitrust product market “are determined by the  
14 reasonable interchangeability of use or the cross-elasticity of demand between the  
15 product itself and substitutes for it.” *Brown Shoe v. United States*, 370 U.S. 294, 325  
16 (1962). “[P]ractical indicia” of an economically distinct market include “industry or  
17 public recognition of the submarket as a separate economic entity, the product’s  
18 peculiar characteristics and uses, unique production facilities, distinct customers,  
19 distinct prices, sensitivity to price changes, and specialized vendors.” *Id.*

20 Market definition challenges are disfavored at the pleading stage because the  
21 validity of a proposed market is “a factual inquiry into the ‘commercial realities’

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22 <sup>7</sup> Smoore’s claim that its settlements with other defendants in the ITC proceeding  
23 were not exclusionary is unpersuasive. *See* Mot. at 18 n.7. If the patent was procured  
24 by fraud, it is plausible that the purpose of the settlement agreement was to extend  
25 the monopoly. *See Ritz Camera & Image, LLC v. SanDisk Corp.*, 772 F. Supp. 2d  
26 1100, 1110 (N.D. Cal. 2011), *aff’d*, 700 F.3d 503 (Fed. Cir. 2012). *Wonderful Real  
Est. Dev. LLC v. Laborers Int’l Union of N. Am.*, 2020 WL 91998 (E.D. Cal. Jan. 8,  
2020), on which Smoore relies, is inapposite because the plaintiff there did not allege  
bad faith with respect to the alleged sham litigations. *See* Mot. at 18 n.7.

27 <sup>8</sup> Smoore’s reliance on *Dairy, LLC v. Milk Moovement, Inc.*, 2022 WL 4387981 (E.D.  
28 Cal. Sept. 22, 2022) and *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 876 (Fed. Cir.  
1985) is misplaced. Neither case involved patents obtained by fraud on the USPTO.  
*See Dairy*, 2022 WL 4387981, at \* 2-3; *Loctite*, 781 F.2d at 877-78.

1 faced by consumers.” *High Technology Careers v. San Jose Mercury News*, 996 F.2d  
2 987, 990 (9th Cir. 1993); *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1044-  
3 45 (9th Cir. 2008) (alleged markets often “survive scrutiny under Rule 12(b)(6)  
4 subject to factual testing by summary judgment or trial” because market definition  
5 typically turns on factual disputes).

6 Smoore’s shifting market definition arguments illustrate why courts do not  
7 resolve market definition disputes at the pleading stage. NLV originally defined the  
8 relevant market as “closed cannabis oil vaporizer systems.” ECF No. 36 ¶¶ 70-86.  
9 Smoore objected that Smoore’s products could not be called a “system” because they  
10 were not sold filled with cannabis oil. ECF No. 54 at 4. So NLV added the phrase  
11 “and components.” Smoore’s new challenge is that the words “and components”  
12 render the market overbroad and “ill-defined.” Mot. at 10.

13 But the market is far from ill-defined. Smoore described in detail and  
14 diagrammed the products in the alleged market. *See* Compl. ¶ 20. Both Smoore and  
15 NLV sell those products (unfilled) to purchasers who fill the cartridge with cannabis  
16 oil, cap it, and then sell the systems on to consumers through various retail outlets.  
17 *Id.* ¶ 97. NLV alleges that the market for the sale of these unfilled closed systems is  
18 separate from the market for other cannabis delivery systems because: (1) consumers  
19 recognize that closed systems offer significant advantages that other systems do not;  
20 (2) closed systems generally are sold to different customers than other cannabis  
21 delivery systems; (3) manufacturers of closed systems do not typically compete with  
22 manufacturers of open systems; and (4) the price of closed systems can be increased  
23 a significant and non-transitory amount without losing customers to other delivery  
24 systems. AA&C ¶¶ 94-105. These allegations—which Smoore does not challenge—  
25 are sufficient to plead that closed systems are a separate market. This Court should  
26 not require NLV to play market definition whack-a-mole at the pleading stage.

27 In any event, Smoore’s argument misapprehends the interchangeability  
28 inquiry. Interchangeability addresses whether products *outside* the market definition

1 are economically interchangeable with products *within* the product market, not  
2 whether every product within a market is functionally interchangeable. *Brown Shoe*,  
3 370 U.S. at 325 (“The outer boundaries of a product market are determined by the  
4 reasonable interchangeability of use or the cross-elasticity of demand *between the*  
5 *product itself and substitutes for it.*”) (emphasis added). The relevant question is  
6 whether a closed system is economically interchangeable with a product *outside* the  
7 relevant market, for example, a cannabis-infused brownie. The relevant question is  
8 *not*, as Smoore suggests, whether “mouthpieces are interchangeable with unfilled  
9 cartridges.” Mot. at 11. That question is entirely academic, because the mouthpiece  
10 is useless for cannabis consumption without the cartridge and vice versa. *See* Compl.  
11 ¶ 20 (diagram of closed system).

12 Controlling authority demonstrates that Smoore’s approach is wrong. For  
13 example, in *Brown Shoe*, a seminal merger case, the Supreme Court approved a  
14 market for “women’s shoes,” even though not all women’s shoes are functionally  
15 interchangeable (most people would be hard-pressed to play basketball in high heels).  
16 *Brown Shoe*, 370 U.S. at 326. Indeed, the Court specifically rejected the (now dated)  
17 argument that a proposed market for children’s shoes was overbroad because “a little  
18 boy does not wear a little girl’s black patent pump.” *Id.* at 327. And in *Federal Trade*  
19 *Commission v. Qualcomm, Inc.*, 969 F.3d 974, 992 (9th Cir. 2020), which Smoore  
20 cites, the Ninth Circuit approved the district court’s definition of the relevant market  
21 as the market for “modem chips” even though modem chips included both “single  
22 mode” and “multimode” chips and modem chips contained “varying features” and  
23 thus were not all functionally interchangeable. *Id.*, *approving in part Federal Trade*  
24 *Commission v. Qualcomm, Inc.*, 411 F. Supp. 3d 658, 674 (N.D. Cal. 2019).

25 **D. NLV’s Allegations of Anticompetitive Contracts Between**  
26 **Smoore and Its Distributors State a Section I Claim.**

27 NLV alleges that Smoore: (1) agreed to anticompetitive distribution  
28 agreements, which included draconian exclusive dealing clauses and other

1 impermissible restraints; (2) policed the agreements through continuous monitoring  
2 of the conspiracy and bilateral communications with distributors; (3) met with the  
3 distributors collectively and individually to agree on distribution terms and price; and  
4 (4) punished any distributor attempting to compete. AA&C ¶ 143. These allegations  
5 are more than sufficient to allege an unreasonable restraint of trade. *See, e.g., Don*  
6 *Copeland v. Energizer Holdings, Inc.*, 716 F. Supp. 3d 749, 765 (N.D. Cal. 2024)  
7 (“[a]t the pleading stage, plaintiffs need only ... plausibly allege that the restraint  
8 substantially impairs competition in the relevant market ....”).

9 Smoore argues that NLV does not allege “antitrust injury” arising from the  
10 agreements. This argument is both legally incorrect and misses the point. The  
11 relevant question is not whether any individual practice caused NLV “antitrust  
12 injury,” but rather whether Smoore’s overall scheme to monopolize the market,  
13 which included exclusive agreements as well as abusive patent litigation, caused  
14 NLV harm. *Duke Energy*, 111 F.4th at 355. Even considered alone, however,  
15 Smoore’s anticompetitive agreements caused NLV antitrust injury.

16 Federal courts have recognized the harm from exclusive dealing arrangements  
17 in similar situations. *See McWane, Inc. v. F.T.C.*, 783 F.3d 814, 832 (11th Cir. 2015)  
18 (“an exclusive dealing arrangement can be harmful when it allows a monopolist to  
19 maintain its monopoly power by raising its rivals' costs sufficiently to prevent them  
20 from growing into effective competitors.”) (citing XI Philip E. Areeda & Herbert  
21 Hovenkamp, *Antitrust Law* ¶ 1804a, at 116-17 (3d ed.2011)).

#### 22 **E. NLV Has Plausibly Pleaded Substantial Market Foreclosure.**

23 Smoore’s argument that NLV cannot suffer injury from a conspiracy to inflate  
24 prices can be disposed of quickly: NLV does not allege injury from price-fixing. *See*  
25 *Mot.* at 11-12.

26 Smoore next argues that NLV’s market foreclosure allegations are inadequate  
27 because exclusive dealing arrangements violate the Sherman Act “only if their  
28 ‘probable effect is to foreclose competition in a **substantial share** of the line of

1 commerce affected.” Mot. at 12 (emphasis in original). Perhaps the boldface was  
2 intended to distract from Smoore’s failure to define the word “substantial.” Although  
3 no particular level of market foreclosure is dispositive, Courts routinely deem  
4 foreclosures of over 50% sufficient. *See Feitelson v. Google Inc.*, 80 F.Supp.3d 1019,  
5 1030 (N.D. Cal. 2015) (citing *U.S. v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir.  
6 2001); Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1821c (“Percentages  
7 higher than 50 percent are routinely condemned when the practice is complete  
8 exclusion by a contract of fairly long duration[.]”). Indeed, a monopolist’s use of  
9 exclusive contracts may give rise to a § 2 violation even where the contracts  
10 foreclose less than 40% to 50% of the market. *See United States v. Google LLC*, 2024  
11 WL 3647498, at \*107 (D.D.C. Aug. 5, 2024); *Microsoft*, 253 F.3d 34 at 70-71.

12 Here, the question is not close: Smoore’s exclusive dealing agreements  
13 foreclosed NLV from approximately 80% of the market for about four years. AA&C  
14 ¶ 78. NLV also alleges substantial barriers to entry to the market, including a lengthy  
15 research and development process that requires expensive and particular facilities  
16 and equipment, and exhaustive testing both in bench samples and at scale. *Id.* ¶¶ 106-  
17 109. Smoore’s conduct thus vastly increased NLV’s costs and effectively thwarted  
18 NLV’s ability to achieve economies of scale. *Id.* ¶¶ 80-82. NLV was also dropped by  
19 a distributor, forced to maintain costly sales and distribution infrastructure, and  
20 incurred costs such as trade marketing and inventory maintenance that would  
21 otherwise be borne by distributors. *Id.* ¶¶ 75-82. These allegations are more than  
22 sufficient at the pleading stage.

23 **F. Smoore’s Declining Market Share Does Not Insulate It from**  
24 **Liability.**

25 Smoore’s remaining argument is that Smoore’s market share loss during the  
26 relevant period suggests that Smoore did not substantially foreclose the market. Mot.  
27 at 14. This argument is premature. Federal courts have recognized substantial  
28 foreclosure claims where “the targeted rival gained market share—but less than it



likely would have absent the conduct.” *McWane*, 783 F.3d at 838 (citing *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789-91 (6th Cir. 2002)). The relevance of declining market share is thus a fact-intensive question that depends on the facts of each case. *Safeway Inc. v. Abbott Lab’ys*, 761 F. Supp. 2d 874, 890 (N.D. Cal. 2011) (relevance of declining market share “is for a jury to decide.”); *Oahu Gas Serv., Inc. v. Pac. Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (“declining market share may reflect an absence of market power, but it does not foreclose a finding of such power.”); *Cf. Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995).<sup>9</sup> NLV’s allegations of market foreclosure and substantial barriers to entry are ample at this stage.

**G. NLV’s California Cartwright Act Counterclaim Is Sufficiently Pleaded.**

The Cartwright Act “is California’s version of the federal Sherman Act and sets forth California’s antitrust laws.” *Cellular Plus, Inc. v. Superior Court of San Diego Cnty.*, 14 Cal.App.4th 1224, 1232 n.2 (1993). A plaintiff that states a claim for violation of the Sherman Act also states a claim for violation of the Cartwright Act. *See Solyndra Residual Tr. by & through Neilson v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1046 (N.D. Cal. 2014). As NLV has successfully stated a claim under the Sherman Act, NLV has also stated a claim under the Cartwright Act.

**H. NLV’s Induced Infringement Counterclaim Is Sufficiently Pleaded.**

Contrary to Smoore’s arguments, NLV sufficiently pleaded indirect infringement claims providing a basis for Smoore’s pre-suit knowledge. As NLV explained, Smoore had pre-suit knowledge of the ‘294 Patent through a former NLV employee who received extensive training on NLV’s intellectual property and products covered by the ‘294 Patent, who then joined Smoore to make videos

<sup>9</sup> *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997), on which Smoore relies, is not instructive here because it arose after a jury trial and involved foreclosure of a much smaller portion of the market. *Id.* The court in *Omega* held that a jury’s conclusion that exclusive dealings arrangements foreclosed about 38% of the market “substantially overstated” the arrangements’ effects. *Id.* at 1161-64.

1 demonstrating how to use Smoore’s Accused products. *See Avocent Huntsville, LLC*  
2 *v. ZPE Sys., Inc.*, 2018 WL 1411100, at \*20 (N.D. Cal. Mar. 21, 2018) (It is “sufficient  
3 to clear the plausibility hurdle with respect to pre-suit knowledge of the asserted  
4 patents” when patentee alleges “specific former employees, [] worked in the  
5 particular department that designed and developed the specific technology employed  
6 in the accused product.”). Moreover, NLV “need not allege pre-suit knowledge for  
7 its indirect and willful infringement claims based on [] post-suit conduct.” *Cranial*  
8 *Techs., Inc. v. Ottobock SE & Co. KGaA*, 2023 WL 8115126, at \*2 (C.D. Cal. Nov.  
9 2, 2023).

10 As such, NLV has sufficiently pleaded Smoore’s pre-suit knowledge of the  
11 ’294 Patent, and NLV’s induced infringement claim should not be dismissed.

12 **VI. NLV’S AFFIRMATIVE DEFENSES ARE PROPERLY**  
13 **PLEADED**

14 **A. NLV’s Affirmative Defenses of Noninfringement (1<sup>st</sup>), No Willful**  
15 **Infringement (7<sup>th</sup>), Statutory Limitation on Damages (5<sup>th</sup>), and**  
16 **No Exceptional Case (8<sup>th</sup>) Are Proper.**

17 Affirmative defenses should not be struck if “their presence in the Answer does  
18 not prejudice Plaintiffs.” *Ecological Rts. Found. v. Hot Line Constr., Inc.*, 2021 WL  
19 1537205, \*1 (C.D. Cal. Feb. 17, 2021) (Birotte, J.). If there is any doubt that the  
20 defense may succeed, the motion to strike should be denied. *MACOM Tech. Sols.*  
21 *Holdings, Inc. v. Infineon Techs. AG*, 2017 WL 3298670, at \*2 (C.D. Cal. Aug. 2,  
22 2017).

23 “Non-infringement is a valid affirmative defense as recognized by the Patent  
24 Act itself. 35 U.S.C. §282(b)(1).” *Juno Therapeutics, Inc. v. Kite Pharma*, 2018 WL  
25 1470594, \*5 (C.D. Cal. Mar. 8, 2018). Section 282(b)(1) states “Noninfringement”  
26 “shall be defenses in any action involving the validity or infringement of a patent and  
27 shall be pleaded.” 35 U.S.C. §282(b)(1) (emphasis added). Similarly, NLV’s  
28 affirmative defense of no willful infringement is also valid. Furthermore, NLV  
provides fair notice of noninfringement (and therefore no willful infringement) by



1 summarizing the ITC’s findings of no infringement of the same Asserted Patents in  
2 this Action by NLV’s cartridges that are also accused in this case. *See* AA&C ¶¶ 19,  
3 22, 128-130, 135-136.

4 Statutory limitation on damages and no exceptional case affirmative defenses  
5 are likewise allowed in the Ninth Circuit. *See In re Washington Mut., Inc. Sec.,*  
6 *Derivative & ERISA Litig.*, 2011 WL 1158387, at \*2 (W.D. Wash. Mar. 25, 2011)  
7 (declining to strike affirmative defense for no attorneys’ fees, as it is “related to the  
8 litigation and [is] not immaterial, impertinent or scandalous.”); *see also Dodocase*  
9 *VR, Inc. v. MerchSource, LLC*, 2020 WL 363040, \*5 (N.D. Cal. Jan. 22, 2020)  
10 (“district courts [] generally permit defendants to employ [limitations on damages  
11 and costs] as affirmative defenses in an answer,” finding them “properly asserted.”)  
12 (citations omitted); *see also Ecological Rts.*, 2021 WL 1537205, \*1 (Birotte, J.)  
13 (declining to strike affirmative defenses, stating “[e]ven if they are not proper  
14 affirmative defenses, their presence in the Answer does not prejudice  
15 Plaintiffs...[T]his is an academic question upon which the Court need not expend its  
16 resources.”). Consistent with this Court’s and Ninth Circuit practices, NLV’s first,  
17 fifth, seventh, and eight affirmative defenses are allowable and should not be struck.

18 **B. NLV Sufficiently Pleads its Invalidity (2<sup>nd</sup>), Equitable (4<sup>th</sup>),**  
19 **Ensnarement (9<sup>th</sup>), Prosecution History Estoppel (3<sup>rd</sup>), and**  
20 **License, Patent Exhaustion (6<sup>th</sup>) Affirmative Defenses.**

21 “[A]ffirmative defense pleadings need only provide fair notice of the defense”  
22 *Vestem, Inc. v. Regen Labs LLC*, No. 2:24-cv-02475-AB-PDx, ECF No. 59 at 6 (C.D.  
23 Cal. Oct. 10, 2024) (Birotte, J.) (denying application of the *Twombly/Iqbal* standard  
24 for pleading affirmative defenses). Affirmative defenses “while boilerplate, are  
25 standard affirmative defenses,” and are “appropriate at the outset of the case.”  
26 *Baroness Small Estates, Inc v. BJ’s Rests., Inc.*, 2011 WL 3438873, at \*6 (C.D. Cal.  
27 Aug. 5, 2011).

28 NLV provides fair notice of its invalidity, unenforceability, or ineligibility;  
equitable defenses; and ensnarement affirmative defenses, including: detailing

1 asserted U.S. Design Patent 853,635 (the “D635 Patent”) invalidation proceedings  
2 (*see* AA&C ¶¶ 12-17, 53-56); alleging facts that Smoore’s “Liquid 6” cartridge used  
3 at a 2016 U.S. trade show predating filing of the Chinese priority design application,  
4 which “could invalidate,” or make unenforceable, the D635 Patent (*id.* ¶13);  
5 identifying Smoore’s actions in relation to the 2016 trade show which demonstrate  
6 Smoore “practicing the prior art” (*id.* ¶17) and provide fair notice of ensnarement;  
7 and explaining Smoore’s “pattern and practice” of asserting “invalid or  
8 unenforceable” patents, including the priority design patent application above, which  
9 provides fair notice of equitable defenses (e.g. unclean hands). *Id.* ¶¶ 55-57.

10 NLV also sufficiently pleaded its prosecution history estoppel/disclaimer  
11 defense, which this Court declined to strike in *Regen Labs* because it “does not  
12 prejudice Plaintiff.” *Regen Labs*, No. 2:24-cv-02475-AB-PDx, ECF No. 59 at 6  
13 (Birotte, J.). Here, too, Smoore is not prejudiced by this affirmative defense.  
14 “Because prosecution history estoppel has a particular and limited application,”  
15 additional factual development in the Answer is not necessary. *Teirstein v. AGA Med.*  
16 *Corp.*, 2009 WL 704138 at \*7 (E.D. Tex. Mar. 16, 2009).

17 NLV also sufficiently pleaded express/implied license, patent exhaustion, and  
18 single-recovery rule, by providing an example of how the defense would apply.  
19 AA&C at 9:23-10:7. There is no requirement to plead who received a license, type  
20 of license, or circumstances leading to license, and even barebone allegations satisfy  
21 fair notice requirements. *See Multimedia Pat. Tr. v. DirecTV, Inc.*, 2011 WL  
22 13100718, at \*2 (S.D. Cal. Feb. 24, 2011) (not striking barebones defense for  
23 doctrines of waiver, equitable estoppel, implied license and/or patent exhaustion,  
24 finding “sufficient notice [] and [] no prejudice.”). Thus, for each of its second, third,  
25 fourth, sixth, and ninth affirmative defenses, NLV alleges sufficient “facts indicating  
26 the grounds on which the defense is based” (*Rosen v. Masterpiece Mktg. Grp., LLC*,  
27 222 F. Supp. 3d 793, 802 (C.D. Cal. 2016)), and they should not be struck.

1                   **VII. CONCLUSION**

2                   For the reasons stated above, the Court should deny Smoore's motion to  
3 bifurcate and stay and/or dismiss NLV's counterclaims and deny Smoore's motion  
4 to strike NLV's affirmative defenses.

5  
6 Dated: November 15, 2024                   Respectfully submitted,

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